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IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-1408

EMMETT RAYMOND PROCELL,
Defendant-Petitioner,

versus

STATE OF LOUISIANA,
Plaintiff-Respondent.

On Petition for Writ of Certiorari to the
Supreme Court of the State of Louisiana

MOTION TO DISMISS AND BRIEF OF THE STATE OF LOUISIANA IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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MAY IT PLEASE THE COURT:

STATEMENT OF QUESTIONS PRESENTED

Whether the prosecutor's remarks during voir dire amounted to prejudicial error, and

Whether defendant's right to remain silent was violated by any comment on his post arrest silence.

STATEMENT OF THE CASE

On December 15, 1976, the defendant-petitioner, Raymond Procell joined two others who were already seated at a table in the Carolyn Lounge located near Zwolle in Sabine Parish, Louisiana. The two men seated at the table other than the petitioner were Eugene Sepulvado and Patrick Meshell, the latter the deceased victim. Previous to arriving at Carolyn's Lounge, Mr. Meshell and Mr. Sepulvado had spent a good part of that Thursday, the 16th of December, drinking beer. According to Mr. Sepulvado's testimony, the two men could have realistically consumed more than twenty-two bottles of beer each, during the eight or nine hours that they were drinking.

Petitioner Procell had been in the lounge once before during the evening of the 16th of December. At that time the owner, Gary Schuman, noticed the defendant had a concealed weapon stuck in his belt. He approached the defendant and asked him for the gun, a request to which the petitioner complied. He took the gun and placed it behind the cash register. Shortly after, the defendant asked for return of his property and left the lounge.

Petitioner came back to the lounge about an hour or so later. The hour nearing 11:00 p.m. At this time a gun was not observed.

Between the time the petitioner returned and the shooting occurred, he had occasion to ask a number of females to dance. Among these were Frankie Paddy and Debra Parker. Both girls declined the petitioner's offer. After the defendant asked Debra Parker to dance, and she declined, she proceeded to dance with Patrick Meshell, the victim. Then Mr. Meshell went back to his table after the dance and Ms. Parker testified that she heard the defendant say "Go ahead and laugh if you think it's funny."

Immediately after hearing the comment a gunshot was heard. It was discharged from a Colt Trooper .357 and fatally wounded Patrick Meshell. Patrick Meshell fell on the table, bleeding profusely. The petitioner sat a few moments, then put the revolver into his pants and left the lounge. No offer of assistance had been made on the part of the petitioner to help the victim.

The petitioner was arrested later that morning and charged with first degree murder.

Petitioner was represented by retained counsel at his trial before a jury. He was found guilty of first degree murder by a unanimous verdict and subsequently sentenced to life imprisonment. He was 39 years of age at the time of sentencing. His conviction was affirmed, *State vs. Procell*, 365 So.2d 484 (1978). A copy of the opinion and dissent is found as Appendix A and B in petitioner's Application for Writ.

SUMMARY OF ARGUMENT

There was no prejudice to the petitioner by any statement made by the District Attorney during the voir dire, nor was there any violation of petitioner's constitutionally guaranteed right to remain silent.

ARGUMENT

I. Supreme Court of the United States Revised Rules, Rule 19 Precludes Review of State Law Not In Conflict with Federal Law or Posing a Federal Question.

Neither the petitioner's right to a fair and impartial trial, nor his right to remain silent was violated by any comment by the District Attorney. Inasmuch as no federal law is in question or is there any federal question involved in petitioner's application the State submits the petition should be dismissed.

II. Prosecutor's Remarks During Voir Dire Were Not Prejudiced

Where defense counsel did not make known his desire for cautionary instruction, there is no error. *State vs. Ray*, 249 So.2d 540 (1971). In any event, there is nothing in the record to show that the trial court's admonitions to the jury were not sufficient to cure any alleged incidents of personal impressions expressed by the District Attorney or that the jury was actually influenced by such remarks or that they contributed to the verdict returned by them. *State vs Major*, 134 La.

774, 64 So. 710; *State vs. Borde*, 209 La. 905, 25 So.2d 736, citing *State vs. Tucker*, 204 La. 463, 15 So.2d 854. See also *State vs. Dennis*, 194 So.2d 720, 725 (1967).

III. There Was No Violation of Defendant's Right to Remain Silent

The defendant took the stand in his own defense. Once a defendant takes the stand, he is subject to cross-examination on the whole case. R.S. 15:462; *State vs. Lovett*, 345 So.2d 1139 (1977); *State vs. Cripps*, 250 So.2d 382 (1971). This includes the right to pose questions to test his credibility. *State vs. Collins*, 283 So.2d 744 (1973).

Under no circumstances, could this issue be raised to the level of *United States vs. Hale*, 422 U.S. 171 (1975) or *Doyle vs. Ohio*, 426 U.S. 610; *State vs. Smith*, 336 So.2d 867 (1976). Cf. *State vs. Montoya*, 340 So.2d 557 (1976) where the defendant did not take the stand.

There is no merit to these contentions.

CONCLUSION

For the foregoing reasons, it is respectfully requested that the order of the court below be affirmed and the petitioner's Application for Writ of Certiorari be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Abbott J. Reeves, the undersigned attorney, hereby certify that I have this day mailed three copies of the above and foregoing Brief in Opposition to a Petition for a Writ of Certiorari to J. Michael Small, Esq., 711 Washington Street, P.O. Box 1792, Alexandria, Louisiana 71301, attorney for petitioner, by placing same in the United States Post Office, first class, postage prepaid, said service being made in compliance with United States Supreme Court Rule 33(1).

Gretna, Louisiana, this ____ day of April, 1979.

ABBOTT J. REEVES